No. 21080

United States
COURT OF APPEALS

for the Ninth Circuit

PACIFIC INLAND NAVIGATION COMPANY, a corporation,

Appellant-Cross-Appellee,

v.

DELBERT A. COURSE,

Appellee-Cross-Appellant.

Appeal from the United States District Court for the District of Oregon

HONORABLE JOHN F. KILKENNY

BRIEF OF APPELLEE

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JURISDICTION

The appellee concurs with the statement of jurisdiction as set forth in the Brief of Appellant.

STATEMENT OF THE CASE

This action involves a Libel in Personam for damages based on unseaworthiness of the tug "BANNOCK" instituted by a ship repairman-marine electrician, Del-

bert A. Course, appellee, against his employer-shipowner, Pacific Inland Navigation Company, appellant. It arose from a shipboard accident on December 19, 1963, at Vancouver, Washington, when appellee fell through a hatchway which was inadequately covered with a piece of plywood over which appellant's employees had thrown the canvas cover of a lifeboat. The appellee had been on the bridge of the tug BANNOCK with the Captain of the vessel for the purpose of installing an amber whistle light (a light on top of the wheelhouse which flashes when the ship's whistle sounds and is used by other vessels to locate the vessel sounding the whistle). The appellee was leaving the bridge and going ashore, when the accident happened. At the time of the accident, the tug was afloat and had auxiliary power and electrical power. Most of the crew was aboard. The captain had just approved the location picked out by the appellee for the installation of the whistle light.

The vessel was undergoing a minor annual overhaul. Prior to the accident, some repairs had been commenced on the engines by the ship's engineers, and subsequent to the accident the vessel was moved to dry dock, whether or not under her own power is not known.

The trial court held that the vessel was unseaworthy, that it was in navigation and not a dead ship; that the appellee was performing a service traditionally performed by seamen, and that the appellee was entitled to bring his action against his employer, the appellant, under the doctrine of *Reed* v. *S. S. Yaka,* 373 U.S. 410, 83 S. Ct. 1349, 10 L. Ed. 2d 448.

The unseaworthiness of the tug BANNOCK and the damages awarded appellee are not issues in this appeal.

SUMMARY OF ARGUMENT

1. A ship's repairman engaged in work traditionally performed by seamen is entitled to the warranty of seaworthiness.

2. The warranty of seaworthiness extends to a ship's repairman, both where the vessel is owned or under the control of a third person and where (as here) it is owned and operated by the repairman's direct employer.

3. The mere fact that the ship's repairman is receiving benefits under the Longshoremen and Harbor Workers' Compensation Act does not bar his action for unseaworthiness against his direct employer.

4. The tug BANNOCK, at the time of the appellee's injury, was afloat, moored to a dock, undergoing a minor annual overhaul, and warranted its seaworthiness. It was not a dead ship out of navigation.

5. Since the appellee was engaged in work traditionally performed by seamen, he is entitled to the warranty of seaworthiness, and the fact that he was regularly employed by the appellant as a marine electrician, rather than as a longshoreman, is of no significance to this appeal.

ARGUMENT

A harbor worker injured on a vessel while employed in work traditionally performed by seamen is entitled to the warranty of seaworthiness from his employership owner, although receiving benefits under The Longshoremen's and Harbor Workers' Compensation Act.

The keystone decision of *THE OSCEOLA* (1903) 189 U.S. 158, 23 S. Ct. 483, 57 L. ed. 760, set forth for the first time the proposition that the fate of an injured seaman was linked with vessel unseaworthiness and gave him an effective remedy against the ship. Of the four propositions set forth in the case, the second one, at page 175, states:

> "2. That the vessel and her owner are, both by English and American law, liable to an indemnity for injuries received by seamen in consequence of the unseaworthiness of the ship, or a failure to supply and keep in order the proper appliances appurtenant to the ship. *Scarff* v. *Metcalf,* 107 N.Y. 211, 13 N.E. 796."

Following this decision, the question was raised as to whether or not the work of a longshoreman was in the nature of a maritime service. The Supreme Court answered in the affirmative in *Atlantic Transport Company of West Virginia* v. *Imbrovek* (1913), 234 U.S. 52, 34 S. Ct. 733, 58 L. ed. 1208, where the Court held, at page 61:

> "The libellant was injured on a ship, lying in navigable waters, and while he was engaged in the performance of a maritime service. We entertain

no doubt that the service in loading and stowing a ship's cargo is of this character. Upon its proper performance depend in large measure the safe carrying of the cargo and the safety of the ship itself; and it is a service absolutely necessary to enable the ship to discharge its maritime duty. Formerly the work was done by the ship's crew; but, owing to the exigencies of increasing commerce and the demand for rapidity and special skill, it has become a specialized service devolving upon a class 'as clearly identified with maritime affairs as are the mariners.' "

With the enactment of the Longshoremen's and Harbor Workers' Compensation Act in March, 1927, 44 Stat. 1424, 33 U.S.C. 901, et seq., the further question was raised in the case of *Seas Shipping Co.* v. *Sieracki* (1946) 328 U.S. 85, 66 S. Ct. 872, 90 L. ed. 1099, as to whether the longshoremen would have the seamen's remedy under the General Maritime Law for injuries proximately caused by the unseaworthiness of the ship. The crux of the controversy was whether the ship owners' obligation for unseaworthiness to seamen extended to longshoremen injured while doing the ship's work, but while employed by an independent stevedoring contractor whom the employer had hired to load or unload the vessel. The Court held, at page 97, as follows:

"Accordingly we think the Court of Appeals correctly held that the liability arises as an incident, not merely of the seaman's contract, but of performing the ship's services with the owner's consent. For this view, in addition to the states con-

sideration of principle, the court rightly found support in the trend and policy of this Court's decisions, especially in International Stevedoring Co. v. Haverty, 272 US 50, 71 L ed 157, 47 S Ct 19; Atlantic Transport Co. v. Imbrovek, 234 US 52, 58 L ed 1208, 34 S Ct 733, 51 LRA (NS) 1157, and Uravic v. F. Jarka Co. 282 US 234, 35 L ed 312, 51 S Ct 111."

and, further, at page 99:

"Running through all of these cases, therefore, to sustain the stevedore's recovery is a common core of policy which has been controlling, although the specific issue has varied from a question of admiralty jurisdiction to one of coverage under statutory liability within the admiralty field. It is that for injuries incurred while working on board the ship in navigable waters the stevedore is entitled to the seaman's traditional and statutory protections, regardless of the fact that he is employed immediately by another than the owner. *For these purposes he is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards.* Moreover, to make the policy effective, his employer is brought within the liability which is peculiar to the employment relation to the extent that and because he also undertakes the services of the ship." (Emphasis added)

Following the *Sieracki* decision (supra), many lower courts attempted to limit the doctrine solely to longshoremen and not to include other ship's repairmen. See *Guerrini* v. *United States,* 167 F.2d 352 (C.C.A. 2d 1948) and *Christiansen* v. *United States,* 94 F. Supp. 934, 192 F.2d 199 (C.A., First Cir. 1951).

The issue came before the Supreme Court in *Pope & Talbot, Inc.* v. *Hawn* (1954), 346 U.S. 406, 74 S. Ct. 202, 98 L. ed. 143. Hawn was a carpenter doing carpentery work on grain loading equipment at the time of his injuries. He brought a civil action in the United States District Court, charging that his injuries resulted from the vessel's unseaworthiness and Pope & Talbot's negligence. The issue was raised that Hawn was a carpenter, while Sieracki was a stevedore. The Supreme Court held, at page 412, as follows:

> ". . . We are asked, however, to distinguish this case from our holding there. It is pointed out that Sieracki was a 'stevedore.' Hawn was not. And Hawn was not loading the vessel. On these grounds we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded with the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. *All were subjected to the same danger. All were entitled to like treatment under the law.*" (Emphasis added)

The Court further found, at page 413 of the report:

". . . The fact that Sieracki upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the Court thereby blotted out their long-recognized right to recover in admiralty for negligence."

The Court further stated, at page 411:

". . . Of course the substantial rights of an injured person are not to be determined differently whether his case is labelled 'law side' or 'admiralty side' on a district court's docket."

The Supreme Court then reaffirmed its position that those who do the type of work traditionally done by seamen, no matter how labeled, are entitled to a seaworthy ship.

In *United New York and New Jersey Sandy Hook Pilots Association* v. *Halecki,* 358 U.S. 613, 79 S. Ct. 517, 523, 3 L. ed. 2d 541, the Court stated, at page 617:

". . . Seas Shipping Co. v. Sieracki and Pope & Talbot, Inc. v. Hawn made clear that the shipowner could not escape liability for unseaworthiness by delegating to others work traditionally done by members of the crew. Whether their calling be labeled 'stevedore,' 'carpenter,' or something else, those who did the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or who were about to go on a voyage,' were entitled to a seaworthy ship. See 346 US at 413."

And in *The Vessel M/V "TUNGUS"* v. *Skovgaard,* 358 U.S. 588, 79 S. Ct. 503, 523, 3 L. ed. 2d 524, the Supreme Court applied the same doctrine to a main-

tenance foreman unloading oil from a vessel. It is stated, at 3 L. ed. 2d, page 530:

> "The Court of Appeals also determined that the decedent was within the class protected by the warranty of seaworthiness as developed by federal maritime law, which it found the New Jersey statute had incorporated. This subsidiary determination is clearly correct. The decedent's status is practically indistinguishable from that of the plaintiff in Pope & Talbot, Inc. v. Hawn, 346 US 406, 98 L ed 143, 74 S Ct 202, the only difference being that the cargo here was oil instead of grain, and was being unloaded instead of loaded."

To like effect, are *Feinman* v. *A. H. Bull S.S. Company* (1952) (D.C. Pa.), 107 F. Supp. 153 (an electrician);

Bow v. *Pilato* (1949) (D.C., So. Dist. California), 82 F. Supp, 399 (an engineer);

Imperial Oil, Ltd v. *Drilik,* 234 F.2d 4 (6th Cir. 1956), a line handler);

Ross v. *SS ZEELAND,* 240 F.2d 820 (4th Cir. 1957) (a night watchman);

Shenker v. *U. S.,* 322 F.2d 622 (2d Cir. 1963) (a time keeper);

Sacony-Vacuum Oil Co., Inc. v. *Lawlor,* 275 F.2d 599 (2d Cir. 1960) (a shipyard worker on overhauled tanker);

Pioneer SS Co. v. *Hill,* 227 F.2d 262 (6th Cir. 1956) (a shipfitter's helper).

See annotation, "Who, other than seamen, are entitled to benefits of seaworthiness doctrine — federal cases," 3 L. ed. 2d 1764.

Concurrently with this broad concept of extending the protection of seaworthiness to all shoreside workers, injured while doing work traditionally performed by seamen, there developed the concept of indemnity by the employer to the shipowner if the cause of the accident was due to the action or inaction of said employer. *Ryan Stevedoring Co.* v. *Pan-Atlantic Steamship Corp.*, 350 U.S. 124, 100 L. ed. 133, involved an injury due to unsafe storage of cargo, wherein the original plaintiff obtained judgment against the ship owner, even though he had received benefits under the Longshoremen's Act. It was held that the stevedoring company would be responsible to indemnify the ship owner for such loss, even though the result would be that the employer would then be buying compensation insurance and, in addition thereto, would be paying additional sums to ship owners by reason of negligence of the employer or his employees.

Following the *Hawn* decision and its progeny (supra), the next issue was obvious. Could a ship owner insulate himself from liability to *Sieracki* and *Hawn* stevedores and repairmen if he performed his own stevedoring and repair work, or, to state otherwise, could a harbor worker employee bring an action against a ship owner direct employer, where the employer wore two hats—one as a stevedoring company and other as a shipowner—while such an employee was covered under the

Longshoremen's and Harbor Workers Compensation Act?

The answer was not long in forthcoming in *Reed* v. *SS YAKA,* 373 U.S. 410, 83 S. Ct. 1349, 10 L. ed. 2d 448. The Court, putting together the two developing concepts set forth in *Hawn* and *Ryan,* met the issue squarely by saying, at page 414:

> ". . . we pointed out several times in the *Sieracki* case, which has been consistently followed since, that a ship owner's obligation of seaworthiness cannot be shifted about, limited, or escaped by contracts or by the absence of contracts, and that the ship owner's obligation is rooted, not in contracts, but in the hazards of the work . . . In making this argument Pan-Atlantic has not pointed and could not point to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in one in which the owner hires an independent company. In either case, under Ryan, the burden ultimately falls on the company whose default caused the injury."

As to the exclusiveness of the Longshoremen's and Harbor Workers' Act, the Court continued, at page 414:

> ". . . Pan-Atlantic relies simply on the literal wording of the statute, and it must be admitted that the statute on its face lends support to Pan-Atlantic's construction. But we cannot now consider the wording of the statute alone. We must view it in light of our prior cases in this area, like Sieracki, Ryan, and others, the holdings of which have been left unchanged by Congress. . . . In light of this whole body of law, statutory and decisional, only

> blind adherence to the superficial meaning of a statute could prompt us to ignore the fact that Pan-Atlantic was not only an employer of longshoremen but was also a bareboat charterer and operator of a ship and, as such, was charged with the traditional absolute, and nondelegable obligation of seaworthiness which it should not be permitted to avoid. We have previously said that the Longshoremen's Act, 'must be liberally construed in conformance with its purpose, and in a way which avoids harsh and incongruous results.' "

The Court further considered the fact that Pan-Atlantic was a bareboat charterer from Waterman. It held, at 373 U.S. 412:

> ". . . It has long been recognized in the law of admiralty that for many, if not most, purposes the bareboat charterer is to be treated as the owner, generally called owner pro hac vice."

To argue, as appellant does, that a ship-owner-employer may not be sued for damages by an employee because of the exclusive provisions of the Act is to completely ignore the literal wording of the case, which, as the Court stated at page 415 of the report:

> "We think it would produce a harsh and incongruous result, one out of keeping with the dominant intent of Congress to help longshoremen, to distinguish between liability to longshoremen injured under precisely the same circumstances because some draw their pay directly from a shipowner and others from a stevedoring company doing the ship's service. Petitioner's need for protection from unseaworthiness was neither more nor less than that

of a longshoreman working for a stevedoring company. . . ."

Appellee submits that the case plainly sets forth the proposition that a ship owner cannot insulate itself from liability to an injured harbor worker by acting as its own stevedoring and repair company.

In the May, 1964, issue of the Stanford Law Review, the Notewriter discusses *Reed* v. *YAKA* as follows, at pages 563-64:

> "There is no question about squaring this decision with the Longshoremen's Act. As the dissent pointed out, it simply cannot be done. In effect, section 5 of the Act, which makes the employer's liability for compensation 'exclusive and in place of all other liability . . . at law or in admiralty on account of such injury,' must be regarded as amended by a proviso: 'provided the employer is not an owner or operator of a ship.'
>
> "The decision does not rest on an inscrutable mystery of the maritime libel in rem. This is fairly clear from the opinion itself. And in one recent lower court decision, Yake was construed, quite rightly it would seem, to allow a longshoreman to sue his bareboat-charterer-employer for unseaworthiness in a personal action on the law side of the federal district court."[1]

This proposition is sustained by *Hertel* v. *American Export Lines, Inc.,* 225 F. Supp. 703 (1964) (U. S. Dist. Ct., 7th Dist. N. Y.), wherein the plaintiff, a longshoreman injured aboard a vessel owned by his employer

[1] *Hertel* v. *American Export Lines,* 225 F. Supp. 703 (S.D. N.Y. 1964).

brought an action for breach of warranty for seaworthiness and negligence under the Jones Act. In regard to the issue of the breach of warranty, the Court held, at page 704,

> "The right to maintain the unseaworthiness claim finds full support in Reed v. The Yaka. . . ."
>
> . . . . .
>
> "The underlying rationale of the reversal was grounded upon the broad humanitarian policy of the doctrine of unseaworthiness and its purpose to protect all those engaged in the ship's service against the hazards of unseaworthiness. It rested upon the absolute and nondelegable duty of a shipowner, whether the actual owner or owner *pro hac vice,* to live up to the warranty of seaworthiness, and in the event of a breach, to afford the traditional remedies to an injured person to whom the duty is owing, whether he is a crew member or performing a crew member's work. . . . To have denied him relief upon the unseaworthiness claim would have negated the conceptual doctrine of Seas Shipping Co. v. Sieracki, and its progeny, whereby a longshoreman engaged in the performance of the traditional work of a crew member is afforded the same rights upon such a claim as a regular crew member."

The appellant does not cite the case of *Biggs* v. *Norfolk Dredging Co.,* 360 F.2d 360 (1966) (C.C.A., 4th Cir.), although appellant relied upon the lower court's decision in this case to a great extent at the time of trial in the instant case.

Biggs v. *Norfolk Dredging Co.,* 237 F. Supp. 590 and

Clower v. *Tidewater Raymond Kiewit,* 237 F. Supp. 1015, both from the United States District Court, Eastern District of Virginia, Norfolk Division, attempted to limit the scope of the *Reed* decision. Judge Hoffman stated, in the *Biggs* case, at 237 F. Supp., page 598:

> "Plaintiff, in the instant proceeding, would have us extend the Reed doctrine to include any maritime worker *allegedly* doing the traditional work of seamen, thereby requiring courts to go behind final awards under state or federal compensation acts, and calling upon district courts and juries to reexamine any and all factual contentions. We do not believe that Reed was ever intended to bring about this result. In Reed, the libelant was undeniably in the status of a longshoreman. The same is true in Hertel v. American Export Line, S.D. N.Y., 225 F. Supp. 703. . . . We hold that the limiting effect of Reed must be confined to instances in which the claimant is undeniably a longshoreman working aboard a vessel owned and operated by his stevedore-employer."

Biggs was listed on the payroll as a temporary yard helper. He had a Coast Guard certificate as a seaman and had on occasion handled lines and assisted in maneuvering barges used for the purpose of raising and reassembling a pipe line submerged in the Elizabeth River in Virginia. On the date of the accident, he was on a derrick barge when a section of the pipe struck him and injured him. Clowers was hired and classified as a carpenter, but principally worked upon a large unit of equipment known as, "The Monster," which placed caps upon the piles of a bridge trestle, which was a sec-

tion of the Chesapeake Bay bridge tunnel. At times, he had been engaged aboard barges and at other times he had acted as a survey rodman on still another ship.

The Fourth Circuit reversed both cases, and (though both turned upon whether a summary judgment was the appropriate remedy against the defendants), the Court met the issue here in point by stating that the *Reed* v. *S.S. Yaka* decision applied to each of the appellants. pra), 360 F2d 360, at page 363:

> "The determinative factors in Reed v. The S.S. Yaka, supra, 373 U.S. 410, 83 S. Ct. 1349, are present in each case here. The Supreme Court's ruling was this: if an employer is the permanent or pro hac vice owner of the ship on which his employee is injured while working as a longshoreman, then the employee may sue his employer under the general maritime law for damages, notwithstanding that previously the employee has received compensation."

After quoting the *Reed* v. *The S. S. Yaka* decision, the Court again, at 360 F.2d 364:

> "Like reasoning applies to the instant cases. Each plaintiff now pleads himself a seaman, or alternatively as one doing a seaman's job, and thereby entitled to sue for unseaworthiness. See Seas Shipping Co. v. Sieracki, 328 U.S. 85, 99 66 S. Ct. 872 (1946). It is now elementary that all who do traditional seaman's work are owed, and may sue on, the warranty of seaworthiness. See, e.g., Pope & Talbot, Inc., v. Hawn, 346 U.S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); Ross v S.S. Zeeland, 240 F.2d 820 (4 Cir. 1957); Lawlor v. Socony-Vacuum Oil

Co., 275 F.2d 599, 84 A.L.R.2d 613 (2 Cir. 1960), cert. den. 363 U.S. 844, 80 S. Ct. 1614, 4 L. Ed. 2d 1728 The present plaintiffs may also be armed in like fashion"

and at page 365:

". . . that *Yaka* peremptorily dictates, to repeat, that a seaman-employee, actual or *Sieracki,* injured aboard his employer's vessel is to be put in the same position as one injured aboard a ship owned by a third party, and in the latter situation, the employee could recover compensation from his employer and still sue the third party for negligence or unseaworthiness."

Reed v. S.S. YAKA is not a decision based on procedural maneuvers. It stands for the substantive rule that a worker injured aboard a vessel owned by his employer may bring an action for seaworthiness although receiving compensation under The Longshoremen's and Harbor Workers Compensation Act.

Appellant further seeks to distinguish away the rationale of *Reed* v. *The Yaka* (*supra*). Appellee submits that these are distinctions of form and not of substance and should be treated as distinctions without a difference.

The first distinction made by the appellant is that Reed was a longshoreman and Course, the appellee, was a maritime electrician. This distinction was raised in many cases subsequent to the *Sieracki* decision and is commented upon supra. The *Hawn, Tungus* and the *Halecki* cases, cited *supra,* make this a distinction with-

out difference. To again quote the Supreme Court, in the *Halecki case* (*supra*), 358 U.S. at page 617.

> ". . . .Seas Shipping Co. v. Sieracki and Pope & Talbot, Inc. v. Hawn made clear that the shipowner could not escape liability for unseaworthiness in delegating to others work traditionally done by members of the crew Whether their calling be labeled 'stevedore,' 'carpenter,' or something else, those who did the 'type of work' traditionally done by seamen, and were thus related to the ship in the same way as seamen 'who had been or were about to go on a voyage,' were entitled to a seaworthy ship. See 346 US at 413."

It is worth while noting that appellant cites no cases to this proposition, although appellee has cited several decisions, *Guerrini* v. *United States,* and *Christiansen* v. *United States* (*supra*), that stand for appellant's proposition but were decided prior to the *Hawn, Tungus* and *Halecki* decisions (*supra*).

The second distinction that appellant seeks to make is that *Reed* was a libel in rem against the vessel and that neither Waterman Steamship Corporation, its owner, nor Pan-Atlantic Steamship Company, its owner *pro hac vice* and libelant's employer, were in personam defendants. Following the libel, Waterman appeared as claimant of the ship and impleaded Pan-Atlantic, the bareboat charterer. The District Court Judge held that the vessel was unseaworthy because of a defective pallet supplied by Pan-Atlantic, and that Reed could recover against the ship, and that Waterman could then recover against Pan-Atlantic because of an indemnity

clause in the bareboat charter. The Court of Appeals for the Third Circuit reversed the judgment, holding that neither Waterman nor Pan-Atlantic could be held personally liable for the unseaworthiness, Waterman because the unseaworthiness condition arose after Pan-Atlantic became owner *pro hac vice* of the vessel, and Pan-Atlantic, because is was insulated by the Longshoremen's and Harbor Workers' Compensation Act.

The Supreme Court reversed the Court of Appeals' decision, "Pan-Atlantic could not have been held personally liable to the petitioner for unseaworthiness because Pan-Atlantic was petitioner's employer under the Longshoremen's & Harbor Workers' Compensation Act," by stating at 373 U.S., page 412,

> "We find it unnecessary to decide whether a ship may ever be held liable for its unseaworthiness where no personal liability could be asserted because, in our view, the *Court of Appeals erred in holding that Pan-Atlantic could not be held personally liable for the unseaworthines of the ship which caused petitioner's injury.*" (emphasis ours)

Let us analyze the appellant's argument further. What would the appellant claim if Pan-Atlantic, the employer, as the bareboat charterer of said vessel, had claimed the vessel and had pleaded the actual owner, Waterman? Would appellant then claim that the *Reed* decision could not apply, since this would be a direct action against the appellee's employer and a third party action against Waterman? Appellant seems to be saying that the procedural steps that are used in getting the

defendant before a court with jurisdiction are more important than the substantive law to be applied to the controversy between the parties once they are before the Court. Appellee submits that the substance of the *Reed* decision is that a *Sieracki* seaman may bring an action against his employer when the employer is acting as his own stevedore and *not* with qualifications set forth by appellant that a libel in rem must be filed and that the vessel must be claimed by the actual owner, who in turn must implead the owner *pro hac vice* as a condition precedent to the liability of a ship owner acting as its own stevedore.

In *Hertel* v. *American Export Lines, Inc.* (*supra*), the defendant attempted to distinguish *The Yaka* case, as the appellant does here and the Court held, at 225 F. Supp. 704:

> "The defendant urges that The Yaka is to be distinguished because it was an in rem action, whereas the instant one is brought on the civil side in personam. However, the hard core of the Court's decision, based as it is upon personal liability of the bareboat charterer, renders the claimed distinction invalid. Neither does the fact that the stevedore has been receiving payments under the Act bar the maintenance of this suit."

The *Clower* case, consolidated with *Biggs* v. *Norfolk Dredging Co.*, 360 F.2d 360 (*supra*) was an action also on the civil side, rather than a libel in rem. The Fourth Circuit had no hesitancy in applying *Reed* v. *The Yaka,* as commented upon supra.

Appellee submits that appellant is relying purely

upon form and completely ignoring the rule in the case when appellant argues that *Reed* v. *The Yaka* only applies in circuitous actions that are in rem.

The Tug BANNOCK was in navigation and therefore warranted her seaworthiness.

The Tug BANNOCK was tied up at the dock (Tr. 14, 85, 139). The crew of seven, or a portion thereof, was aboard, and the crew had not been discharged (Tr. 101-102). The captain of the tug testified that the tug was in for a minor overhaul and that the overhaul was on the basis of the hours that the vessel had actually been running (Tr. 102, 123). He further testified that at the time of the accident electrical power was available from the ship's generator (Tr. 109). One of the ship's crew was working on the engines, and another one was due to work on the engines of the ship from 4:00 P.M. until midnight (Tr. 109). The crew was capable of doing this minor engine overhaul (Tr. 109-112). Sufficient power was available from the ship to run its own welder (Tr. 111). The appellee, Course, asked the captain for his approval in placing the whistle light on the wheel house, and the captain went with Course to the wheel house to see how the whistle light was to be rigged (Tr. 112). One of the engines may have been dismantled (Tr. 136), but the appellant's personnel didn't know whether the vessel used its own power to get to drydock subsequent to the accident or not (Tr. 137). It was in for repairs a total of four to five days (Tr. 139).

In *West* v. *United States,* 361 U.S. 118, 80 S. Ct. 189,

4 L. Ed. 2d 161 (1959), the issue was raised of whether the warranty of seaworthiness applied to harbor worker employee working on a vessel, THE MARY AUSTIN, which had been held in storage in the mothball fleet and was undergoing a complete overhaul, the Supreme Court held, at page 121,

> ". . . It is evident that the sole purpose of the ship's being at Atlantic's repair dock at Philadelphia was to make her seaworthy. The totality of the reparation on the vessel included compliance with the hundred of specifications in the contract calling for the repairing, reconditioning, and replacement, where necessary, of equipment so as to make fit all the machinery, equipment, gear, and every part of the vessel. . . . In short, as the trial court said, the work to be done on the vessel was equivalent to 'home port structural repairs.' "

The Court then laid down this rule:

> ". . . It would appear that the focus should be upon the status of the ship, the pattern of the repairs, and the extensive nature of the work contracted to be done, rather than the specific type of work that each of the numerous shore-based workmen is doing on shipboard at the moment of injury. . . ."

With this, the Court held that a mothball vessel, being reconditioned for sea duty, did not warrant its seaworthiness. This rationale was applied in *Nasta* v. *United States* (1959) (Dist. Ct. N.Y.) 181 F. Supp. 906, affirmed Court of Appeals, 2d Circuit, 288 F.2d 186, where a mothball vessel was undergoing repairs, but was

intended to be returned to the mothball fleet, and in *Huber* v. *United States* (1959) (Dist. Ct. Calif.) 177 F. Supp. 617.

The same rationale was applied in *Berryhill* v. *Pacific Far East Line* (1956) (C.C.A. 9th Circ.) 238 F.2d 385, where a ship was in drydock, and the Court held, at page 387,

> ". . . Not all repairs are 'ship's work', to be performed, historically or currently, by the crew."

The Supreme Court qualified its position in the case of *Roper* v. *United States,* 368 U.S. 20, 82 S. Ct. 5, 7 L. Ed. 2d 1. In this case, the SS. HARRY LANE was a liberty ship that had been mothballed in 1945, and in 1954 had been converted to a grain storage vessel, filled with grain and returned to the dead fleet where it remained for two years. In 1956, a sale of the grain was made and unloading operations were commenced, and the petitioner, the foreman of a longshoremen crew, was injured in the process of this unloading. The Court held, at page 22,

> "The test for determining whether a vessel is in navigation is the 'status of the ship,' West v. United States. . . . This is a *question of fact,* Butler v. Whiteman, 356 US 271, 2 L ed 2d 754, 78 S Ct 734 (1958), and consequently reversible only upon a showing of clear error. (Emphasis added)
>
> . . . . .
>
> "In light of the above circumstances, we cannot say as a matter of law that the S.S. Harry Lane had been converted into a vessel in navigation, and

that the findings of the trial court were clearly erroneous.

"Since we are unwilling to upset the trial court's factual determination that the S.S. Harry Lane was not a vessel in navigation, it follows that there was no warranty of the ship's seaworthiness."

With this, the Supreme Court left the trial judge's determination of the status of the vessel unchanged.

In *Socony Vacuum Oil Co.* v. *Lawlor,* 275 F.2d 599, 84 A.L.R.2d 613, the Court stated at page 602:

"Thus the critical question in this case is whether or not the fact that the Mobilfuel was moored in navigable waters at the pier of the shipyard during her annual overhaul gives her a status such that there is no warranty of seaworthiness and no duty to Lawlor to maintain the vessel and her equipment in a seaworthy condition.

". . . Moreover, we do not think resort to a mere phrase such as 'out of navigation' gets us very far. Surely a vessel that has hit one of the submerged logs or other floating obstructions that plague our large harbors and has damaged her propellers so that she has to be towed to a shipyard for a day or two for repairs before continuing her voyage cannot fairly be said to have so changed her status as to eliminate any duty to the officers and crew on board to maintain the vessel and her equipment in a seaworthy condition until the repairs have been completed. Such a vessel is unable to move under her own power, she is still in navigable waters, and would seem to be no more 'out of navigation' at

the pier of a shipyard than she would be if moored to one of the municipal piers, awaiting tugs to move her to a place where the repair to her propellers could be promptly made. Thus, if being 'out of navigation' is a material factor, everything depends upon what we mean by 'out of navigation' in the context of the doctrine of unseaworthiness. If we were pressed to decide whether the Mobilfuel was 'out of navigation' in navigable waters moored at the Bethlehem pier, we would say she was not 'out of navigation'."

Judge Medina then commented, at page 604:

"We have concluded that the character of the work to be done by the shipyard, the presence or absence of a crew performing the customary work of seamen on shipboard, and the consequent measure of control or lack of control by the shipyard over the vessel as a whole, are the determining factors that rule the decision of this case. Doubtless cases will arise in which the question of fact relative to the degree of control exercised respectively by the shipowner and the shipyard may be difficult of resolution. But here we have no conversion of a prisoner of war transport into a passenger carrier for the families of overseas service men (Lyon v. United States, 2 Cir, 1959, 265 F2d 219), nor extensive repairs amounting virtually to the reconstruction and rebuilding of the vessel (Berge, supra), nor a wholly deactivated vessel from the "moth ball fleet" (West, supra), nothing in the category of major repairs or structural and extensive changes in the vessel, but only a large number of relatively small miscellaneous items such as are generally included in an annual overhaul."

In *Pollock* v. *Standard Oil Company of California,* State of California, District Court of Appeal, First District, Division 2, 42 Cal. R. 128, 1965 A.M.C. 255, the fact situations were similar to those set forth in the *Lawlor* case and in the present case. The Court stated in 1965 A.M.C. at page 258:

> "We shall analogize the factual situation in *Lawlor* with that in the instant action. Our inquiry, of course, is whether the evidence in the instant case is sufficient to require the submission to the jury of the factual question as to whether the barge was 'out of navigation' and thus not subject to the doctrine of unseaworthiness.
>
> "*Character of work done by shipyard.* It is substantially the same in *Lawlor* and respondent Standard Oil makes no contention that it was not. Besides, *West* vs. *United States, supra,* holds that the focus should be placed on the status of the ship, rather than the specific type of work which an injured shore-based workman was doing on the ship at the moment of injury. Moreover, it appears that the patching job being done by plaintiff is one which is customarily done by seamen.
>
> "*General control of the vessel. Lawlor* places significance upon the presence or absence of the crew. The subject barge carried a crew of two men, consisting of a tankerman and a bargeman. When the barge was actually in service, their duties were to handle the hoses and valves during the operation of filling the oil tanks on the barge and to work the pumps in the deckhouse during unloading operation. They were also responsible for general maintenance."

. . . . .

"In *Lawlor,* as in the instant case, the vessel 'was in dry dock for a few days' for, as stated therein, 'the customary repairs to and painting of the bottom, propellers and so on.' (1960 A.M.C. at 718, 275 F. (2d) at p. 601). Certainly, the regular crew could not have done this type of work but that did not prevent the court in *Lawlor* from applying the doctrine of unseaworthiness."

In *Hilton* v. *Aegean Steamship Co.,* 239 F. Supp. 268 (Dist. Court of Oregon, 1965), the vessel SS DEMOSTHENES was in the repair yard for 12 days and was in drydock for two days. The cost of repairs was $65,000, and the full crew of the vessel remained aboard. The Court held, at page 269:

"The principal question is whether the SS DEMOSTHENES was a vessel in navigation for the purpose of warranting her seaworthiness. The factors to be considered are 'the character of the work to be done by the shipyard, the presence or absence of a crew performing the customary work of seamen on shipboard, and the consequent measure of control or lack of control.' Lawlor v. Socony-Vacuum Oil Co., 2 Cir. 1960, 275 F.2d 599, 604, 84 A.L.R.2d 613, cert. denied, 363 U.S. 844, 80 S. Ct. 1614, 4 L. Ed. 2d 1728 (1960). The SS DEMOSTHENES was not undergoing a complete overhaul or repairs so extensive in character as to place the vessel out of maritime service; in fact, on the basis of the cost of repairs and the time required to complete them, the repairs were minor. Cf. West v. United States, 361 U.S. 118, 80 S. Ct. 189, 4 L. Ed. 2d 161 (1959); McDonald v. United States, 3 Cir. 1963, 321 F.2d 437, cert. denied, 375 U.S. 969, 84

S. Ct. 487, 11 L. Ed. 2d 417 (1964). In addition, the crew was aboard and in control of the vessel during all such time.

"I therefore find that in the time of the accident the SS DEMOSTHENES was a vessel in navigation for the purpose of warranting her seaworthiness."

On the other end of the spectrum from *West* (*supra*) is *Lusich* v. *Bloomfield Steamship Co.,* 355 F.2d 770 (1966) (U.S.C.A., 5th Cir.) wherein the repairs cost only $311.72, and the Fifth Circuit held that the vessel was not a dead ship.

Based upon the testimony of the appellant's employees and of the appellee and the decisions cited above, it is obvious that the Court's finding that as a matter of fact the Tug BANNOCK was a vessel in navigation and warranted her seaworthiness should not be disturbed.

Appellee was engagged in activities historically performed by a seaman.

When a shore-based worker is engaged in work traditionally performed by a seaman while on a vessel, he is entitled to a seaman's warranty of seaworthiness. *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, *Pope & Talbot* v. *Hawn,* 346 U.S. 406.

The appellee had sailed as a second electrician for a year to a year and a half and as a chief electrician after that, during the years of 1949 to 1961 (Tr. 6). He had worked as a maintenance and construction electrician for the appellant from October, 1962, until the date of the

accident (Tr. 8). His first connection with the BANNOCK was arranging for shore power for the ship, with auxiliary generators, and then going aboard to ascertain what material was needed for the installation of the amber whistle light He had gone below and contacted the captain, who went with him to the whistle light and approved where he was to put the whistle light on top of the wheelhouse. The accident occurred after he was leaving the wheelhouse with the captain, after completing his discussion with him about the installation of the amber whistle light (Tr. 13, 111 and 112). The amber whistle light is a light that remains on while the whistle of the ship is being sounded and aids other vessels to locate the ship blowing the whistle (Tr. 13). He was leaving the wheelhouse to go ashore to make further arrangements about shore power (Tr. 89). An electrician aboard ship usually installs lights if they are needed, and the welding and burning in connection therewith is usually done by the engineering department of the ship when they are at sea (Tr. 99). Electricians aboard ship have the duty to see that all electrical circuits, light circuits and power circuits are in working order and have the duty to repair any deficiency in the light circuit or in the lights themselves, and in case one has to be installed or moved, the electrical work is done by the electricians aboard ship (Tr. 125, 126).

It is undisputed that the ambler whistle light being installed by the appellee just prior to his injury was used as a navigational aid by the ship when sounding

her whistle as a signal to other vessels. It is further undisputed that the captain was in the wheelhouse with the appellee for the purpose of approving the location at which the whistle light was to be installed. In other words, his efforts to that time had been directed toward the installation of navigation aiding equipment—a duty historically performed by electricians at sea. Appellant would have the Court disregard this and rely solely upon the fact that he was leaving the vessel to do something about the shore power.

The cases of *Seas Shipping Co.* v. *Sieracki,* 328 U.S. 85, 66 S. Ct. 872, 90 L. ed. 1099, 1946 A.M.C. 698, and *Pope & Talbot, Inc.,* v. *Hawn,* 346 U.S. 406, 74 S. Ct. 202, 98 L. ed. 143, made it clear that the ship owner could not escape liability for unseaworthiness by delegating to others the work traditionally done by members of the crew, whether their calling be labeled "stevedore" of the crew, whether their calling be labeled "stevedore," "carpenter" or something else. All those who did the type of work traditionally done by seamen and were thus related to the ship in the same way as seamen "who had been or who were about to go on a voyage" were entitled to a seaworthy vessel. See 346 U.S. at 413.

Of like effect are *Feinman* v. *A. H. Bull Steamship Co.* (supra) 107 F. Supp. 153 (D.C. Pa. 1952) (an electrician); *Bow* v. *Pilato,* 82 F. Supp. 399 (1949, U.S.D.C., So. Dist. California) (an engineer), and *Imperial Oil, Ltd.* v. *Drilik,* 234 F.2d 4 (6th Cir. 1956) (a line handler).

In *Pope & Talbot, Inc.* v. *Cordray,* 258 F.2d 214

(C.C.A. 9th Cir.), libelant was aboard the vessel at the time of his injury for the purpose of coordinating cargo handling work of the dock longshoremen with that of the longshoremen working on the vessel, although most of this time had been spent upon shore. The Court held at page 217:

> "In the instant case the appellee, although performing most of his work on the dock in the moving of the ship's cargo from ship's tackle to its first place of rest (which was part of the ship's obligation), was on board the ship when the accident happened. Under the testimony, he was coordinating the unloading of the cargo from the ship's hold to its place of rest on the dock. We hold that the duty of providing a seaworthy ship and gear at the time of this accident extended to the appellee, whether or not appellee was on board the ship or on the dock. The test is, what was the nature of his work? He was performing a service for the ship in the discharge of its cargo. His employer was under contract with the shipowner to take the cargo from the shipside and to put it in a place of storage, and appellee was engaged in the performance of this work. The appellee's work was the work of a longshoreman and he was entitled to seaworthy gear while he was performing his services."

The decision of *Roper* v. *United States* (*supra*), 368 U.S. 20, 82 S. Ct. 5, 7 L. Ed. 2d 1, seems to be the ultimate answer, wherein it is held that whether or not the vessel was in navigation was a matter of fact to be determined by the trial court.

Appellee submits that appellee was engaged in activities traditionally performed by seamen, and that the

decision of the trial court on the issue of fact is based upon the substantial evidence offered by both the appellee and the appellant.

CROSS APPEAL

The District Court erred in dismissing the Appellee's negligence action against the Appellant because Appellee, as a workman aboard a vessel, is owed the duty of reasonable care by the vessel's owner.

SUMMARY OF ARGUMENT

1. Persons working on a vessel or transacting business thereon may recover for damages caused them as a result of a ship owner's negligence.

2. Since appellee's employer was both the ship owner-operator and the harbor worker employer, appellee may recover against him in his ship owner-operator capacity in negligence.

ARGUMENT

A harbor worker may proceed against the owner of a vessel for damages arising out of tort, whether or not the vessel owner is his employer.

The Steamer MAX MORRIS v. *Patrick Curry, et al.,* 137 U.S. 1, 11 S. Ct. 29, 34 L. ed. 586 (1890) was the original case that set the premise cited above. In that case, a longshoreman, employed to load coal aboard a steamship and injured in a fall from the steamer's bridge to her deck, was held to have an action for negligence in admiralty against the vessel.

As recently as *Pope & Talbot* v. *Hawn* (*supra*), 346 U.S. 406, 74 S. Ct. 202, 98 L. ed. 143 (1953), the Supreme Court affirmed the rule that workers, such as the appellee herein, may recover for negligence in admiralty, stating at page 413:

> "A concurring opinion here raises a question concerning the right of Hawn to recover for negligence—a question neither presented nor urged by Pope & Talbot. It argues that the Sieracki Case, by sustaining the right of persons like Hawn to sue for unseaworthiness, placed them in the category of 'seamen' who cannot, under The Osceola, 189 US 158, 47 L ed 760, 23 S Ct 483, maintain a negligence action against the shipowner. The Osceola held that a crew member employed by the ship could not recover from his employer for negligence of the master or the crew member's 'fellow servants.' Recoveries of crew members were limited to actions for unseaworthiness and maintenance and cure. But Hawn was not a crew member. He was not employed by the ship. The ship's crew were not his fellow servants. Having no contract of employment with the shipowner, he was not entitled to maintenance and cure. *The fact that Sieracki upheld the right of workers like Hawn to recover for unseaworthiness does not justify an argument that the Court thereby blotted out their long-recognized right to recover in admiralty for negligence.*" (Emphasis added)
>
> . . . . .
>
> "Illustrative of the unbroken line of federal cases holding that persons working on ships for independent contractors or persons rightfully trans-

acting business on ships can recover for damages due to shipowners' negligence are: Leathers v. Blessing, 105 US 626, 26 L ed 1192 (1882); The Max Morris, 137 US 1, 34 L ed 586 11 S Ct, 29 (1890); Gerrity v. The Kate Cann, 2 F 241 (1880, DC NY); The Helios, 12 F 732 (1882, DC NY), decision by Judge Addison Brown; Grays Harbor Stevedore Co. v. Fountain, 5 F2d 385 (1925, CA 9th Cal); Brady v. Roosevelt S S Co., 317 US 575, 577, 87 L ed 471, 474, 63 S Ct 425 (1943). See also cases collected in 44 ALR 1025-1034."

The position held by this appellee was commented on by Justice Frankfurter in his concurring opinion at page 417.

> "On the one hand, it may be urged that Sieracki broadened the rights of shore workers; it gave them a seaman's status without depriving them of the right of action they had before they attained that status. . . ."

Although a great deal of the argument before the District Court on the issue of negligence was directed toward the application of the Jones Act, for the purposes of this appeal, the appellee is arguing only that part of the negligence action based upon the cause of action historically reserved for persons working aboard vessels. *The Max Morris* (supra); *Pope & Talbot, Inc.* v. *Hawn* (supra).

As recently as *The Kermarec* v. *Transatlantique,* 358 U.S. 625, 79 S. Ct. 406, 3 L. ed. 2d 550 (1958), the Supreme Court reiterated its position on this point and held, at page 632:

". . . We hold that the owner of a ship in navigable waters owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case."

The appellee, if injured aboard a vessel owned by a third party, would have an action against such a third party owner based upon negligence and the failure to exercise due care. This is one of his traditional remedies of the sea.

In *Reed* v. S. S. *Yaka* (supra), 373 U.S. 410, 83 S. Ct. 1349, 10 L. ed. 2d 448, the Court stated the proposition, at page 413:

". . . We further held that the Longshoremen's and Harbor Workers' Act was not intended to take away from longshoremen the traditional remedies of the sea, so that recovery for unseaworthiness could be had notwithstanding the availability of compensation."

The Court further stated, at page 414:

". . . In making this argument, Pan-Atlantic has not pointed and could not point to any economic difference between giving relief in this case, where the owner acted as his own stevedore, and in one in which the owner hires an independent company."

As pointed out above, if the appellant had hired an independent company for its stevedoring, the appellee would be entitled to bring an action for negligence. What is the economic difference between giving relief in this case where the owner acted as his own harbor worker-employer?

Appellee submits that he is entitled to bring this action based upon negligence, which is one of the traditional remedies of the sea where a person is acting as a worker on a vessel.

CONCLUSION

In a review of the *Reed* v. *The Yaka* decision (supra), the January, 1964, Insurance Counsel Journal, 90, at page 95, states:

> "Longshoremen now have available as remedies direct action for damages against their employers for unseaworthiness or negligence where the employer operates the vessel on which the injury occurs. Logically, the same result should apply in cases of other shoreside personnel who sustain injury in the performance of their work traditionally done by seamen, on board a ship operated by their employer."

It is submitted that this summary is a correct statement of the law.

The attempt of the appellant to explain away the *Reed* v. *The Yaka* decision (supra) as a third party action completely overlooks the humanitarian principle set down by the Court, as page 415, that the

> ". . . need for protection from unseaworthiness was neither more nor less than that of a longshoreman working for the stevedoring company. . . . 'All were subjected to the same danger. All were entitled to like treatment under the law.' "

The District Court found that the vessel was in nav-

igation and did warrant its seaworthiness, and that the appellee was engaged in activity traditionally performed by seamen. This decision of fact has ample evidence to sustain it and should not be disturbed by this Court.

Respectfully submitted,

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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